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No. 83-427

In The

Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF NEW JERSEY,

Respondent,

-vs-

JAMES H. HALL, JR.,

Petitioner.

On Petition for Writ of Certiorari
to the Supreme Court of New Jersey

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the question of the jurisdiction of the New Jersey court to create a **per se** procedure whereby a citizen is compelled to submit to a lineup on less than probable cause, without *Miranda* warnings or the right to effective counsel, must be resolved on the basis of federal law.

2. Whether a procedure whereby a citizen is detained and compelled to submit to a linup on the basis of the bare allegations of a police officer, without *Miranda* warnings or bail, on less than probable cause, and without any means of challenging the officer's allegations, deprives a citizen of Fourth, Fifth, Sixth, and Fourteenth Amendment rights.

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REASONS FOR GRANTING PETITION

1. Respondent contends that this Court is without jurisdiction to review the question of the jurisdiction of the New Jersey court to compel a suspect to submit to a linup on less than probable cause. Respondent explains that the decision below rests on independent and adequate state grounds, and that the New Jersey court merely makes "passing reference" to the Fourth Amendment while basing its decision on Article I paragraph 7 of the New Jersey Constitution.

A review of the opinion below reveals numerous references to the Fourth Amendment and to the decisions of this Court. *93 N.J. 552, 556 to 559.* The opinion below is "interwoven with federal law," both Constitutional and decisional. See *Michigan v. Long, ____ U.S. ____, 103 S.Ct. 3469, 3475-3476 (1983).* It contains no statement that the federal cases and constitution are used only for "guidance". Consequently, in accordance with the standards evinced in *Michigan v. Long, supra,* this Court clearly has jurisdiction.

Although Article I paragraph 7 of the New Jersey Constitution of 1947 is taken almost verbatim from the Fourth Amendment, it is recognized that the New Jersey court may afford New Jersey citizens greater protection against unreasonable searches and seizures than may be required by this Court's interpretation of the Fourth Amendment. *State v. Alston, 88 N.J. 211 at 225 (1981; Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv L. Rev. 489 (1977).* In fact, the procedure created by the New Jersey court denies citizens the protections of the Fourth, Fifth, Sixth and Fourteenth Amendments although purporting to afford protection against unreasonable searches and seizures. For this reason also, this Court has jurisdiction.

2. The constitutional inadequacy of the "evidential standards" formulated by the New Jersey Court is the subject of a segment of the Petition for Writ of Certiorari at bar (pages 24 to 29). The inadequacy of the "procedural safeguards" is demonstrated below.

The New Jersey Court states that the suspect should be given "the **opportunity** to have counsel present during the detention." (Emphasis added) *93 N.J. at 565.* This language advises that it is only by favor and not by constitutional right that a suspect may have counsel.

The procedural safeguards contain no requirement that *Miranda* warnings be given at the time of the initial state action in serving the process mandating the detention. A citizen is provided no notice of the right to remain silent, the right to retain counsel, or the right to have counsel furnished if he cannot afford representation.

Describing the lineup, the New Jersey court states, "Defendant, accompanied by counsel, was **permitted** to contest the motion." (Emphasis added) *93 N.J. at 566.* Omitted from the opinion is the fact that defendant was afforded neither rights to discovery nor the opportunity to present witnesses or confront his accusors. Counsel, therefore, had no opportunity to ascertain and present underlying facts

as to credibility, mistake, or suggestibility. Although a nontestimonial hearing, as on a motion, was held, as no discovery was provided and counsel was not permitted to ask even one question before the court of the affiant detective, the right to **effective** legal representation was denied.

Had the opportunity to effective representation been accorded, the affidavit could have been readily impeached:

(1) As the "intruders" were leaving, one of them told Bailey (the alleged male victim) that they would return his television set and stereo when they received money owed to them by **Michael Huff**. (Emphasis added) *93 N.J. at 555.* The affidavit, however, states, "the perpetrators told the victims, "You tell **Louie**, we get our money back, you get your stuff back." (Emphasis added). (Da 5)[1]. As it developed, Michael Huff did not know Mr. Hall (3T 307-308)[2]. Consequently the issuing magistrate was misled to believe the alleged **res gestae** remarks of the perpetrators were inculpatory, when in fact they were exculpatory. Huff, in fact, suggested another suspect.

On viewing the composite of the white male perpetrator, prepared at the instruction of Bailey and Dillon, Huff advised Booket that it resembled John Bennis, who left for Mississippi in a U Haul on February 3, 1978, hours after the robbery. The defense eventually learned from Michael Huff that Bailey described the white male perpetrator to him (Huff) as having dark hair and dark beard (Da 37, 9-13). Mr. Hall is blond.

Detective Booket had in his possession a photograph of John Bennis (3T 312). However, he never showed Bailey or Dillon the photograph of Bennis (3T 288) nor did he attempt to trace Bennis (3T 286-22 to 288-10).

Although Michael Huff provided information which was exculpatory as to Mr. Hall, the affidavit relates only that a polygraph was administered to Huff, and that the results of the test corroborated Louis Campanelli's story (Da 4). In fact, after interviewing Huff, Booket called Bailey and Dillon back to the police department. Bailey and Dillon then admitted to the drug transaction. (3T 290-22 to 291-4). This was omitted from the affidavit.

It is also noteworthy that neither Bailey, Dillon, Campanelli, Huff or any of their cohorts were ever prosecuted for their admitted crimes.

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1 Da refers to the appendix of petitioner's brief before the Superior Court of New Jersey, Appellate Divison.

2 3T refers to Volumes I and II of the trial transcript.

(2) Stacey Dillon, the alleged female victim, on viewing the photolineup identified a photograph of Michael Gonshark as that of the white male perpetrator. (3T 56-15 to 58-10). The affidavit misleadingly states, that on viewing the photolineup, Stacey Dillon "was unable to identify the perpetrator of the crime." (Da 5). Apparently, the police never investigated Michael Gonshark.

(3) Early in the investigation, Louis Campanelli was interviewed by Detective Wicklund of the Aberdeen Township Police Department. Detective Wicklund's report, made in connection with that interview, stated, "This *Hall* holdup was over a drug rip-off" (Emphasis added). At trial, Detective Wicklund admitted that at the time of the interview, Mr. Hall was not a suspect, nor was his name ever mentioned, but stated that the *Hall* holdup was intended to be the **whole** holdup (3T 508-1 to 10; 3T 14-19 to 25).

From the foregoing, it is clear that Detective Booket deleted crucial exculpatory materials known to him at the time of preparation of the affidavit. From the information which was in the possession of the police, it would appear that they were determined to implicate Mr. Hall. Had counsel been accorded rights to discovery and confrontation, these underlying facts could have been presented to the issuing magistrate. However, by denying the right to effective representation, the New Jersey court has created a **per se** procedure permitting the police to detain citizens and require them to submit to a linup on the basis of a paper warrant.

Further examination of the affidavit reveals the paucity of the evidence therein:

(1) There was no identification by the victims of Mr. Hall's photograph. The photoarray shown to Bailey and Dillon contained a then eight year old photograph of Mr. Hall, taken when Mr. Hall had been arrested for a charge which was administratively dismissed by the prosecutor without accusation or indictment. On viewing the photoarray, Bailey was uncertain and Dillon pointed out another photograph. (Da 5).

(2) The affidavit relates that the affiant detective (Booket) had been advised that an informant had stated that the composite of the white male perpetrator resembled James Hall. (Da 4). The informant was not personally known to Booket and the affidavit did not contain any information attesting to the informant's reliability or veracity. Nor did Booket receive information directly from the informant as to the basis of the informant's knowledge. Clearly, the information

allegedly supplied by the informant would not have satisfied the *Aguilar-Spinelli* test operative at the time, or the *Illinois v. Gates* test. See *Illinois v. Gates, 103 S.Ct. 2317 (1983), Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969).*

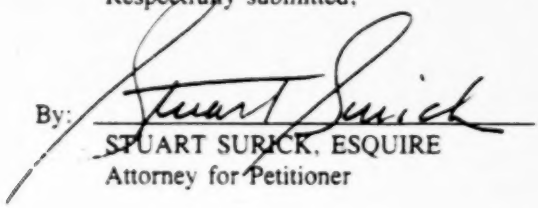
Viewing it in its entirety, the evidence in the affidavit clearly falls short of **any** evidential standard heretofore required by this Court to sustain a Fourth Amendment search and seizure. Respondent's claim that the New Jersey court has followed the decisions of this Court and added the protection of prior judicial approval is misleading and false. As a citizen is afforded no realistic opportunity to challenge the affidavit, the procedure abases the judiciary to the role of investigatory police. While satisfying the New Jersey court's standards, a magistrate reviewing an application for a lineup detention may sanction a lineup based on the speculation of an overzealous police officer or the contrivances of an ambitious prosecutor. The latter would be immune from later liability for abuse of process while the innocent citizen is harassed and his reputation blemished.

No investigative detention sanctioned by this Court heretofore is comparable to the detention herein. The *Terry* stop and frisk pertains to an exigent protective search for weapons. See *Terry v. Ohio, 392 U.S. 1 (1968).* The incidental detention of *Michigan v. Summers, 452 U.S. 692 (1981),* was permitted only because of the juxtaposition of occupants to the execution of a traditional probable cause search. Although the *Dunaway* Court does not address detentions pursuant to a warrant, that opinion would certainly proscribe an investigative arrest on less than probable cause where rights to bail and *Miranda* warnings are denied. *Dunaway v. New York, 442 U.S. 200 (1979).* And certainly the *Davis* Court (*Davis v. Mississippi, 394 U.S. 721 (1969)* did not contemplate that the New Jersey court would clone its suggestion that under narrowly defined circumstances, detention for fingerprinting on less than traditional probable cause may be permissible, to create a **per se,** less than probable cause procedure for detention for lineup purposes, where factors of human error, psychology and motivation come into play, and a citizen is denied the protections of the Fourth, Fifth, Sixth, and Fourteenth Amendments.

CONCLUSION

For the reasons set forth in the petition for certiorari and in this reply brief, petition for writ of certiorari should be granted.

Respectfully submitted,

By: 

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DATED: November 28, 1983